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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re J.Y., JR., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B209559 (Super. Ct. No. J1251574) (Santa Barbara County)
SANTA BARBARA COUNTY CHILD WELFARE SERVICES, Plaintiff and Respondent, v. J.Y., SR., Defendant and Appellant.	

J.Y., Sr. ("Father") appeals orders of the juvenile court denying his modification petition, declaring that his son J. is adoptable, and terminating his parental rights. (Welf. & Inst. Code, §§ 388, 366.26, subd. (c)(1).)[1] We affirm.

FACTS AND PROCEDURAL HISTORY

On November 1, 2006, Santa Barbara County Child Welfare Services ("CWS") filed a dependency petition on behalf of nine-year-old J. and his two half-siblings. CWS alleged that the children's mother ("Mother") had used

[1] All further statutory references are to the Welfare and Institutions Code unless stated otherwise.

methamphetamine during her recent pregnancy. At birth, hospital toxicology tests revealed the presence of methamphetamine in Mother and the newborn. Father has a lengthy criminal history, including arrests and convictions for drug, sex, and violent crimes. CWS alleged that the children's parents had failed to protect and provide for them. (§ 300, subds. (b), (g), (j).)

On November 2, 2006, the juvenile court ordered that the children be detained. Father attended the hearing, stated orally and on Judicial Council Form JV-505 that he was J.'s alleged father, and requested a paternity test.[2] He confirmed his residential street address, apartment number, and city. The court appointed counsel for Father for the purpose of establishing paternity. It ordered paternity testing, and advised Father that notices would be mailed to the address that he confirmed. The court warned Father that he must inform it of any change of address; otherwise, he would not receive forthcoming court notices and documents.

On January 4, 2007, the juvenile court held a jurisdiction hearing. Father did not attend. The court sustained the allegations of the dependency petition, declared the children dependents of the court, and later ordered CWS to provide family reunification services to Mother. The court did not order that Father receive family reunification services because he was an alleged father.

Father did not participate in paternity testing in 2006 or 2007. He missed appointments for testing on December 20, 2006, December 27, 2006, January 24, 2007, and February 21, 2007. The CWS social worker left telephone messages for him to schedule paternity testing and on March 13, 2007, sent him a registered letter concerning testing. Father responded to the letter and the CWS social worker scheduled a paternity test for April 4, 2007. Despite written notice of the testing date, Father did not attend the test.

Father attended only the detention hearing and an initial jurisdiction hearing. He did not attend the continued jurisdiction hearing, disposition hearing,

[2] Initially Mother informed CWS that Father was J.'s alleged father.

interim review, 6-month review, or 12-month review hearings, but his attorney did. On July 12, 2007, the court relieved Father's attorney from representing Father regarding paternity.

Indian Child Welfare Act (25 U.S.C. 1901 et seq.) ("ICWA")

At the detention hearing, the juvenile court inquired of the parties' Native American ancestry. Mother stated that she may have Chumash Indian ancestry and Father stated that he has no known Indian ancestry. On January 8, 2007, CWS sent notice on Judicial Council Form JV-135 ("Notice of Involuntary Child Custody Proceedings for an Indian Child") to the Santa Ynez Band of Mission Indians (Chumash) concerning the names and addresses of Mother and Father. Subsequently, the Indian tribe responded that J. was not eligible for enrollment. On February 8, 2007, the juvenile court found that the ICWA did not apply.

Permanent Planning

On December 20, 2007, the juvenile court terminated Mother's family reunification services and set the matter for a permanent plan hearing.[3] A notice of writ advisement form was mailed to Father the following day. On January 29, 2008, Father sought an extraordinary writ vacating the juvenile court order, and requesting visitation, family reunification services, and custody of J. We denied the petition for extraordinary writ. (*J.Y., Sr. v. Superior Court* (Mar. 26, 2008, B204704) [nonpub. opn.].)

Approximately one month following issuance of the remittitur, Father participated in a paternity test. After receiving notice of the positive test results, CWS requested that the juvenile court find that Father is J.'s biological father. At Father's request, the juvenile court had earlier reappointed counsel to represent him.

In an addendum to the permanent plan report, CWS attached a photocopy of the March 2, 2001 judgment dissolving the marriage of Mother and Father. The judgment required Father to pay monthly child support for J. Approximately one year

[3] Mother is not a party to this appeal.

earlier, Mother had informed CWS that she and Father were married at the time of J.'s conception and birth.

Thereafter, Father filed a modification petition pursuant to section 388, requesting that he receive family reunification services as J.'s presumed father. Father stated that he did not receive notice of prior proceedings, that paternity test results indicate that he is J.'s biological father, and that he and J.'s Mother were married at the time of J.'s birth.

On July 10, 2008, the juvenile court held a combined modification petition and permanent plan hearing. (§§ 388, 366.26.) It denied the modification petition without an evidentiary hearing. In ruling, the judge stated: "[The petition] is inadequate on its face to show a change of circumstances . . . . I'm absolutely astounded . . . that [Father] required [a] paternity test rather than simply producing the information about the fact that he was married at the time that the child was conceived and born." The judge also commented that it is unlikely that Father would have obtained reunification services in view of his lengthy history of drug crimes and crimes of violence. The court then concluded by clear and convincing evidence that J. is adoptable, and it terminated Mother and Father's parental rights.

Post-Judgment ICWA Proceedings

Following termination of parental rights, CWS filed an ICWA report describing additional information provided to the Chumash Indian tribe regarding Mother's biological and adoptive parents. Attached to the report were copies of Judicial Council forms regarding possible Indian ancestry (JV-130, JV-135), a response from the Santa Ynez Tribal Health Clinic stating that Mother and the children are not tribal descendants, and a response from the Santa Ynez Band of Mission Indians stating that Mother is not a tribal descendant, among other things. On November 24, 2008, the juvenile court ruled that the ICWA did not apply.[4]

[4] We have augmented the appellate record to include these documents.

Father appeals and contends that: 1) the juvenile court erred by not identifying him as J.'s presumed father; 2) the juvenile court erred by not appointing counsel for Father as J.'s presumed father; 3) the trial court abused its discretion by denying his modification petition without holding an evidentiary hearing; 4) there is no clear and convincing evidence that J. is likely to be adopted; and 5) CWS did not comply with the notice and inquiry requirements of the ICWA.

DISCUSSION

I.

Father argues that the juvenile court erred by not inquiring at the inception of the dependency regarding paternity. (§ 316.2.) He points out that Mother informed CWS at the time of disposititon that they were married when J. was conceived and born. The court's error, he asserts, denied him the right to participate in the proceedings and to request placement and reunification services. He contends the error is not harmless beyond a reasonable doubt. (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 734 [standard of review where parent denied due process right].)

The juvenile court's inquiry was proper. Mother initially identified Father as J.'s alleged father. At the detention hearing, Father orally stated that he was an alleged father in response to the court's question, and requested in writing a paternity test (Judicial Council Form JV-505). At the time, Father was represented by counsel. Father did not inform the court of his marriage to Mother. At any time during the dependency proceeding, Father could have so informed the court. Moreover, Father delayed paternity testing for 17 months, despite the many appointments made by CWS. Father had the opportunity to participate fully in the proceedings by cooperating in paternity testing or by informing the court of the marriage. He did neither. The court did not err.

Father asserts that the juvenile court erred by appointing counsel to represent him concerning paternity only, because he is J.'s presumed father.

The juvenile court initially appointed counsel for Father for the purposes of determining paternity. As an alleged father, Father was not entitled to visitation, family reunification services, or custody. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451.) The court did not err.

II.

Father asserts that the juvenile court abused its discretion by not holding an evidentiary hearing concerning his modification petition. (§ 388, former subd. (c), now (d) ["If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ."]; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415 [court must hold section 388 hearing if petition presents any evidence that hearing would promote best interests of child].) He points out that the court received evidence of his marriage dissolution and paternity test. He adds that he intended to challenge the arrests and criminal convictions described in CWS reports.

The juvenile court may modify an order if a parent shows, by a preponderance of the evidence, changed circumstances or new evidence, and that the modification would promote the best interests of the child. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446.) In determining the best interests of the child, the court shall consider the reason for the dependency, the reason the problem was not overcome, the strength of the parent-child and child-caretaker bonds, the length of time the child has been a dependent, the nature of the change of circumstance, the ease by which the change could be achieved, and the reason it was not made sooner. (*Id.* at pp. 446-447.) We test the juvenile court's decision for an abuse of discretion. (*Id.* at p. 447.)

The juvenile court did not abuse its discretion because Father did not make a prima facie showing of changed circumstances or that modification of prior court orders would be in J.'s best interests. At the detention hearing, Father stated that he was an alleged father and demanded a paternity test. Despite many written and oral notices of test appointments, Father delayed participating in testing for 17 months.

Although he knew that he had been married to Mother at the time of J.'s birth, he did not so inform CWS or the court. Moreover, Father had little or no relationship with J., before or during the 20-month dependency period, having had no contact with him since 2006. J.'s need for permanency and stability outweighs Father's last-minute request for presumed father status and family reunification services.

III.

Father argues that there is insufficient clear and convincing evidence that J. is likely to be adopted. (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623-624 [agency must provide clear and convincing evidence that adoption will occur within a reasonable time].) He contends that CWS did not provide an adequate adoption assessment as required by section 366.21, subdivision (i). (*In re Valerie W.* (2008) 162 Cal.App.4th 1, 14-16 [order terminating parental rights reversed where adoption assessment did not comply with requirements of section 366.21].)

Sufficient evidence supports the juvenile court's finding by clear and convincing evidence that J. is likely to be adopted. CWS reported that J. has no medical or developmental problems and was newly placed in an adoptive home. He performs well in school, is active in sports and after-school activities, and is engaging and well-adjusted. The report states that J. and his half-sibling "have endeared themselves to every social worker who has worked with them." A finding of likely adoption does not require that the child already be in a potential adoptive home or that a proposed adoptive parent has been identified. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) "Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor." (*Id.* at pp. 1649-1650.) Father has not met his burden of establishing that the finding does not rest upon sufficient evidence. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947 [general rules regarding review of sufficient evidence].)

IV.

Father contends that CWS did not comply with the inquiry and notice requirements of ICWA because the initial information provided to the Chumash Indian tribe was insufficient to allow a determination of Mother's Indian ancestry. He therefore asserts that the juvenile court erred by concluding that ICWA did not apply to J.

Following the termination of parental rights, CWS filed an addendum report describing additional notice provided to the Chumash Indian tribe. The report contained copies of Mother's additional family history information regarding her parents and grandparents, the notice sent to the Indian tribe, and the tribe's later responses. The juvenile court read and considered the report and its attachments at a hearing attended by Father's counsel. It properly found that CWS fulfilled its duties of inquiry and notice and that ICWA did not apply to J.

The orders are affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

James E. Herman, Judge

Superior Court County of Santa Barbara

Anne E. Fragasso, under appointment by the Court of Appeal, for Defendant and Appellant.

Dennis A. Marshall, County Counsel, Toni Lorien, Deputy, Joel F. Block, Deputy, for Plaintiff and Respondent.